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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JASON BERLIN, Defendant and Appellant.	D073030 (Super. Ct. No. SCD261086)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed.

Raymond Mark DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Berlin pleaded guilty to one count of rape of an intoxicated person. (Pen. Code, § 261, subd. (a)(3).)[1] The trial court initially sentenced Berlin to the upper term of eight years in prison. The court later recalled Berlin's sentence under section 1170, subdivision (d), and resentenced him to the middle term of six years.

Berlin appeals. He contends (1) the trial court erred by denying his pre-resentencing motion to withdraw his guilty plea; and (2) the judgment should be reversed and the matter remanded for the trial court to consider whether to admit Berlin to a pretrial mental health diversion program under recently-enacted section 1001.36.

We conclude that Berlin's first contention is barred by his failure to obtain a certificate of probable cause under section 1237.5. Berlin's second contention is unpersuasive because he is categorically barred from the mental health diversion program based on his rape conviction. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Over several months, Berlin engaged two self-described "pickup" instructors (Alexander Smith and Jonas Dick) to help him seduce and have sex with women. On October 13, 2013, Smith and Dick met the victim and her friend outside a bar in San Diego and brought them back to an apartment that Berlin had rented. While Dick distracted the victim's friend, Smith and Berlin raped the victim. The victim was heavily intoxicated and could not resist. When the victim's friend realized what was happening,

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1 Further statutory references are to the Penal Code unless otherwise specified.

she confronted the men, who told them to leave. Outside the apartment, the victim told her friend she had been raped, and they called police.

Berlin was charged, along with Smith and Dick, with rape of an intoxicated person (§ 261, subd. (a)(3)) and rape of an unconscious person (§ 261, subd. (a)(4)). Berlin pleaded guilty to rape of an intoxicated person and agreed to cooperate with the prosecution. In exchange, the prosecution agreed to dismiss the remaining charge of rape of an unconscious person.[2]

At Berlin's sentencing, the prosecution recommended the middle term of six years in prison. The trial court disagreed and imposed the upper term of eight years in prison. Berlin appealed. (See *People v. Berlin* (D071975, app. filed Mar. 14, 2017).)

While that appeal was pending, the trial court recalled Berlin's sentence under section 1170, subdivision (d). This court therefore dismissed Berlin's appeal, and the trial court set a new sentencing hearing. In advance of that hearing, Berlin filed a motion to withdraw his guilty plea. He primarily argued that his plea was not knowing or voluntary because his counsel erroneously advised him that he had no valid defense to the charges. He claimed that competent counsel would have investigated and substantiated a defense based on Berlin's autism spectrum disorder, which allegedly prevented him from forming the mental state required for the offense of rape of an intoxicated person.

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2 Berlin testified on behalf of the prosecution at Smith's trial. Smith was convicted of rape of an intoxicated person and rape of an unconscious person. This court affirmed his conviction. (See *People v. Smith* (Dec. 21, 2017, D071479) [nonpub. opn.].) Dick pleaded guilty to rape of an unconscious person.

At the new sentencing hearing, the trial court denied Berlin's motion to withdraw his plea. The court found that it had no jurisdiction to consider the motion because it was outside the scope of resentencing under section 1170, subdivision (d). (See *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1476.) After reconsidering Berlin's sentence, the court decided to impose the middle term of six years in prison.

Berlin appealed again. In connection with his notice of appeal, he requested a certificate of probable cause. He contended that the issue of the court's jurisdiction to consider his motion to withdraw his plea was a nonfrivolous ground for appeal. The trial court denied his request. Berlin challenged this denial by petition for writ of mandate, which this court summarily denied. (*Berlin v. Superior Court* (D073946, May 11, 2018).) Berlin petitioned for review in the California Supreme Court, but he was unsuccessful. (*Berlin v. Superior Court* (S248881, June 27, 2018).) This appeal has therefore proceeded without a certificate of probable cause, and this court entered an order limiting the issues accordingly.[3]

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3 The Attorney General has filed an unopposed request for judicial notice, which we grant in part. We will take judicial notice of the appellate record in *People v. Berlin* (D071975) and the portion of the appellate record in *People v. Smith* (D071479) reflecting Berlin's trial testimony for the prosecution. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We decline to take judicial notice of a document concerning the legislative history of Penal Code section 1001.36 because it is not relevant to the issues resolved in this appeal. (See *People v. Townsel* (2016) 63 Cal.4th 25, 42, fn. 2 [court need not take judicial notice of irrelevant materials].)

DISCUSSION

I

Motion to Withdraw Guilty Plea

Berlin contends the trial court erred by denying his motion to withdraw his guilty plea on jurisdictional grounds. He claims the judgment should be reversed so that the court can consider his motion on its merits.

Because Berlin appeals following a guilty plea, we must first consider whether his contention is barred by his failure to obtain a certificate of probable cause. "The right to appeal from a final judgment of conviction based on a plea of guilty or no contest is subject to certain limitations, including first obtaining a certificate of probable cause from the trial court." (*People v. Arriaga* (2014) 58 Cal.4th 950, 958 (*Arriaga*), citing §§ 1237, subd. (a), 1237.5.) "The provision lays down a 'condition precedent' to the taking of an appeal within its scope. [Citation.] It is a general 'legislative command' to defendants. [Citation.] It is not an authorization for 'ad hoc dispensations' from such a command by courts. [Citation.] Indeed, it effectively precludes dispensations of this sort, which are 'squarely contrary' to its terms [citations]." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098 (*Mendez*).)

" 'The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy "by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing

court." [Citations.] [¶] 'It has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation].' " (*People v. Buttram* (2003) 30 Cal.4th 773, 781.)

Moreover, as directly relevant here, "[a] defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea." (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) This requirement applies both where a defendant contends his motion should have been granted and where, as here, the defendant seeks remand for the trial court to reconsider the motion in the first instance. "Whether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*Id.* at p. 682; accord, *People v. Brown* (2010) 181 Cal.App.4th 356, 361.)

Berlin failed to obtain a certificate of probable cause. He is therefore precluded from raising issues that challenge the validity of his guilty plea, including his contention that the court erred by denying his motion to withdraw his plea.

Berlin claims an "exception" to the certificate requirement applies, but the statute admits no such exceptions where a certificate is otherwise required. (See *Mendez, supra*, 19 Cal.4th at p. 1098.) Berlin relies on *People v. Totari* (2002) 28 Cal.4th 876, but the exceptions identified in that opinion are not exceptions to the certificate requirement. They are exceptions to the general rule that a postjudgment order " 'ordinarily is not appealable when the appeal would merely bypass or duplicate appeal from the judgment itself.' " (*Id*. at p. 882.) Here, as we discuss further below, the order denying Berlin's motion to withdraw his plea was not a postjudgment order. It was entered before the appealed judgment, and it is therefore reviewable on appeal from the judgment itself. *Totari* has no application here.

Berlin also argues that the certificate requirement should not apply because otherwise the merits of his motion to withdraw his plea would escape review. But the purpose of the requirement of a certificate of probable cause is, in fact, to prevent appellate review if the defendant cannot state a nonfrivolous ground for appeal. A defendant subject to the certificate requirement may not appeal without it. (§ 1237.5 ["No appeal shall be taken . . . ."].) Here, the trial court determined that Berlin had not raised a nonfrivolous ground for appeal that would justify issuing a certificate of probable cause. We summarily denied Berlin's petition for writ of mandate and the Supreme Court likewise denied review. It would subvert the purpose of the certificate requirement for this court to examine the merits of Berlin's contention again in this appeal. We express no opinion whether Berlin's claims of ineffective assistance of counsel might be pursued in other proceedings, such as habeas corpus.

Separately, Berlin claims the order denying his motion to withdraw his plea should be seen as a *postjudgment* order (an appeal from which would not be subject to the certificate requirement, see *Arriaga*, *supra*, 58 Cal.4th at p. 960) because it occurred after his initial sentencing. We disagree. The order was entered prior to Berlin's resentencing. The resentencing resulted in a new sentence and therefore a new judgment. (See *People v. Rivera* (1984) 157 Cal.App.3d 494, 497 ["The resentence became the sentence and thus the judgment."]; see also *People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9; *People v. Wilcox* (2013) 217 Cal.App.4th 618, 625 [" 'A "sentence" is the judgment in a criminal action . . . .' "].) The new judgment following resentencing was generally appealable as a final judgment of conviction. (§ 1237, subd. (a); see *People v. Roe* (1983) 148 Cal.App.3d 112, 118.) In an appeal from that judgment—assuming the certificate requirement has been met (or was not applicable)—Berlin could challenge any intermediate order or decision affecting the judgment. (See *People v. Mena* (2012) 54 Cal.4th 146, 152-153; *People v. Allgood* (1976) 54 Cal.App.3d 434, 439.) The trial court's order denying Berlin's motion to withdraw his plea was plainly an intermediate order affecting the judgment, since the court would not have entered the appealed judgment if it had granted Berlin's motion. It was therefore an intermediate order, leading to an appealable judgment, and not a postjudgment order.

In sum, because Berlin has appealed from a judgment following his guilty plea, and his contention on appeal challenges the validity of that plea, he was required to obtain a certificate of probable cause to proceed. Berlin has not obtained a certificate of

probable cause. His contention that the court erred by denying his motion to withdraw his plea is therefore barred, and we will not consider its merits.

II

Mental Health Diversion

Berlin next contends the judgment should be reversed and the matter remanded for the trial court to determine whether he should be granted mental health diversion under section 1001.36. Section 1001.36 was enacted while this appeal was pending and became effective immediately. (See Stats. 2018, ch. 34, §§ 24, 37.) Berlin argues that section 1001.36 applies retroactively to him because it is an ameliorative statute and his case is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).)

Section 1001.36 created a pretrial diversion program for certain defendants who suffer from mental disorders and meet the criteria specified in the statute. (§ 1001.36, subd. (b).) If a defendant meets these criteria, the trial court may postpone criminal proceedings against him to allow the defendant to undergo mental health treatment. (§ 1001.36, subds. (a), (c).) If the defendant performs satisfactorily in diversion, the trial court shall dismiss the criminal charges against him. (§ 1001.36, subd. (e).)

Three months after section 1001.36 was enacted and became effective, the statute was amended to exclude defendants like Berlin who have been charged with rape. (§ 1001.36, subd. (b)(2)(C), added by Stats. 2018, ch. 1005, § 1.) The amendment became effective approximately three months later. (See Cal. Const., art. IV, § 8, subd. (c), par. (1); Gov. Code, § 9600, subd. (a).)

The Attorney General argues that this contention, too, is barred by Berlin's failure to obtain a certificate of probable cause. Recent opinions have split on the issue of whether a defendant must obtain a certificate of probable cause to raise retroactivity arguments in other, similar contexts. (Compare *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1079 and *People v. Hurlic* (2018) 25 Cal.App.5th 50, 57-59 [certificate not required] with *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016-1017 [certificate required].) The Attorney General also argues that section 1001.36 should not be given retroactive effect. (Cf. *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted Dec. 27, 2018, S252220 [holding that section 1001.36 is retroactive under *Estrada*]; *In re M.S.* (2019) 32 Cal.App.5th 1177, 1191 (*M.S.*) [same].)

We need not consider these arguments because, even assuming that Berlin may raise this contention without a certificate of probable cause, and further assuming that section 1001.36 applies retroactively under *Estrada*, Berlin is not entitled to relief because he is categorically excluded from diversion under the current statute. As noted, a defendant may not be granted diversion if he is charged with certain offenses, including rape. (§ 1001.36, subd. (b)(2)(C).) Berlin was charged with rape of an intoxicated person and rape of an unconscious person. He is therefore ineligible for diversion under current law. (See *M.S.*, *supra*, 32 Cal.App.5th at p. 1191 [pretrial diversion under § 1001.36 not available to juvenile, found to have committed murder, whose appeal was pending on and after statute was amended to exclude enumerated crimes].) Even assuming that section 1001.36 applied to Berlin under *Estrada*, he could not benefit from it.

Berlin claims that under *Estrada* he should enjoy the benefit of section 1001.36 as initially enacted, which did not exclude defendants charged with rape. Berlin is incorrect. Under *Estrada*, Berlin would enjoy the benefit of unamended section 1001.36 only if we could conclude the Legislature intended the unamended version to apply retroactively to nonfinal cases like this one. We cannot reach such a conclusion here.

" 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.) "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada, supra,* 63 Cal.2d at p. 745.)

In order to apply the unamended section 1001.36 retroactively under *Estrada*, we would have to infer that the Legislature determined that the lack of mental health diversion for defendants charged with the specified offenses (including rape) was too severe a penalty and continuing to apply such a rule in nonfinal cases would be an act of

vengeance. But the subsequent amendment to section 1001.36 forecloses that inference. It specifically excludes those defendants from the mental health diversion program. We may therefore infer that this exclusion is not too severe a punishment. It is, in fact, exactly what the Legislature intends. The *Estrada* rule does not compel the retroactive application of unamended section 1001.36.

Berlin asserts that applying the amended section 1001.36, rather than the unamended version, would violate the federal and state prohibitions on ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) Again, he is incorrect. As our Supreme Court has explained, " ' "any statute [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." ' " (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 294; accord, *People v. White* (2017) 2 Cal.5th 349, 360.) "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." (*Weaver v. Graham* (1981) 450 U.S. 24, 28-29 (*Weaver*); accord, *In re Vicks* (2013) 56 Cal.4th 274, 287.)

"Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the

legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." (*Weaver*, *supra*, 450 U.S. at p. 30.)

On the date of Berlin's offense, he would not have been eligible for mental health diversion (because the program did not exist yet). Similarly, under amended section 1001.36, he is not eligible for mental health diversion (because he is categorically excluded). The amendment to section 1001.36 did not increase the punishment Berlin faced, when compared with the date of the commission of his offense, because in both instances mental health diversion would be unavailable to Berlin. The amended statute does not violate the constitutional prohibitions on ex post facto laws as applied to Berlin. (See *People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1054.)

Berlin relies on *People v. Perez* (1998) 68 Cal.App.4th 346, but it is distinguishable. *Perez* considered a statutory amendment that replaced a pretrial drug diversion program with a deferred entry of judgment program. (*Id*. at p. 351.) The defendant in *Perez* committed his offense while the diversion program was in effect, but the trial court applied the later-enacted deferred entry of judgment program to his case. (*Id*. at pp. 349-350.) *Perez* held that such application "arguably" violates ex post facto principles: "[A]pplication of the 1997 amendments to section 1000 to pre-1997 conduct can be viewed as making a defendant's punishment more burdensome than the applicable punishment at the time of the commission of the alleged conduct. [Citation.] Therefore, application of 1997 section 1000 to conduct committed before January 1, 1997, arguably is a prohibited application of an ex post facto law." (*Id*. at p. 356, fn. omitted.)

Unlike in *Perez*, applying amended section 1001.36 to Berlin does not result in any greater punishment than Berlin faced when he committed his offense. In both cases, as noted, pretrial mental health diversion would not be available to him. Berlin has not established any ex post facto violation.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

IRION, Acting P. J.

DATO, J.